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The Reasonable Limits of Narrowing Construction—State v. Hensel, 901 N.W.2D 166 (Minn. 2017)

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THE REASONABLE LIMITS OF NARROWING CONSTRUCTION—*STATE V. HENSEL*, 901 N.W.2D 166 (MINN. 2017).

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I. INTRODUCTION

In *State v. Hensel*, the Minnesota Supreme Court held that a disorderly conduct statute was unconstitutionally overbroad because it reached conduct protected by the First Amendment to the United States Constitution.[1] The *Hensel* dissent agreed that the statute was overbroad,[2] as did the district court.[3] Given this general concurrence regarding overbreadth, it should come as no surprise that the constitutionality of this specific disorderly conduct statute is not the most compelling aspect of this case.

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1. State v. Hensel, 901 N.W.2d 168, 169 (Minn. 2017) ("Minnesota Statutes § 609.72, subdiv. 1(2) (2016), is facially unconstitutional under the First Amendment to the United States Constitution because it is substantially over broad.").
2. *Id.* at 181.
3. *Id.* at 169.

Rather, the central dispute in *Hensel* hinged on the threshold at which a constitutionally overbroad statute's language is "readily susceptible" to a narrowing construction.[4] Regarding this threshold, the dissent in *Hensel* argued that nearly all constitutionally flawed statutes are susceptible to narrowing constructions, even where adding or deleting significant statutory language is required.[5] Further, the *Hensel* dissent stressed that courts are compelled to adopt a narrowing construction if doing so will avoid invalidating a law due to constitutional overbreadth.[6]

In contrast, the majority in *Hensel* concluded that the separation of powers doctrine requires genuine restrictions on judicial authority to narrowly construe legislation, reasoning that unchecked construction that effectively rewrites law steps impermissibly into the legislative domain.[7] In *Hensel*, the majority could not reconcile any proposed narrowing construction with the plain meaning of the statute, finding that each construction amounted to rewriting rather than reinterpreting the law.[8] Hence, the majority refused to adopt a narrowing construction of the statute, and the law was invalidated.[9]

This note begins with a summary of the *Hensel* decision, including a synopsis of important facts and procedural history, a background of the disorderly conduct statute at issue in the case, and an examination of the Minnesota Supreme Court's ruling.[10] A summary of the relevant legal history and precedential context of the *Hensel* court's dramatically conflicting views on the limits of narrowing construction follows.[11] In the analysis, this note addresses the provocative chasm that separates *Hensel*'s intensely disparate positions on narrowing constructions. Next, this note considers how the dissent (as well as

4. *Id.* at 175.

5. *Id.* at 183 (stating that adding a "through conduct, not speech" limitation and "deleting 'or having reasonable grounds to know' from the statute" was an acceptable narrowing construction).

6. *Id.* at 181 (stating that the court "will invalidate a statute for facial overbreadth only 'as a last resort,'" and that the court should "narrowly construe statutes to avoid facial invalidity whenever possible" (citing State v. *Crawley*, 819 N.W.2d 94, 105 (Minn. 2012)).

7. *Id.* at 177.

8. *Id.* at 176 ("[T]he statute is not 'readily susceptible' to any of these three narrowing constructions because they all would require us to rewrite the statute, not simply reinterpret it.").

9. *Id.* at 166.

10. *See infra* Part II.

11. *See infra* Part III.

those making similar arguments for narrowing constructions that exceed the plain meaning of statutory text) relies on decisions that fail to strike a proper balance between controlling precedent and critical policy interests.[12] Finally, the note concludes by calling into question the consequences of the fighting words doctrine,[13] which encourages judicial rewrites of constitutionally overbroad legislative language even where such revisions require an alarming disregard for the plain meaning of statutory text.[14]

II. THE HENSEL DECISION

A. Facts and Procedural Posture

Robin Lyne Hensel is a retired resident of the city of Little Falls who regularly attends Little Falls City Council meetings.[15] On June 7, 2013, Hensel was removed from a Little Falls City Council meeting after she sat in an area other than the designated public gallery.[16] Hensel refused to vacate the area and sit in the public gallery even after the Little Falls City Attorney warned her that a police officer would remove her and issue her a ticket for disorderly conduct if she did not relocate.[17]

On June 3, 2013, at the previous council meeting, Hensel sat in the front row of the public gallery and displayed signs depicting dead and deformed children.[18] The signs were placed around Hensel's chair within the public gallery area.[19] Hensel also wore a sign on her head.[20] At that meeting, tables and chairs were set up between the public gallery and the council dais due to a recent council work session.[21] The mayor's husband was at the meeting and asked to sit at the work-

12. *See infra* Part IV.

13. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

14. *See id.* (pointing out that the court adopted a "fighting words" limitation in narrowly construing a much broader statute that, by its plain meaning, prohibited speaking any annoying words, as well as making derisive noises, in public places); *infra* Part V.

15. State v. Hensel, 874 N.W.2d 245, 248 (Minn. Ct. App. 2016), *rev'd*, State v. Hensel, 901 N.W.2d 166 (Minn. 2017).

16. *Hensel*, 901 N.W.2d at 169; *see also Hensel*, 874 N.W.2d at 248.

17. *Hensel*, 874 N.W.2d at 248.

18. *Id*.

19. *Id.*

20. *Id.*

21. *Id.*

session tables.[22] The council president allowed him and other members of the public to come forward and sit in front of Hensel at the work-session tables, so that they would not be disturbed by Hensel's signs.[23] Then, immediately after the meeting was called to order, the mayor moved to close the meeting, which was rescheduled to occur four days later, on June 7, 2013.[24]

On June 7 there were no tables or chairs set up between the public gallery and the dais, as there were on June 3.[25] Hensel initially sat in the front row of the public gallery.[26] However, before the meeting was called into order, Hensel moved her seat into the area between the gallery and the dais, where members of the public were permitted to sit during the June 3 meeting.[27] "Hensel asserted that she moved her seat forward because of what she believed to be unequal treatment based on events at the June 3 city council meeting."[28] When Hensel moved her chair into the contested area, the public works director, the police chief, the city attorney, and city council members asked Hensel to move her chair back to the public-seating area.[29] Hensel refused to move her chair unless she was shown a policy that prevented her from sitting there.[30] Ultimately, police removed Hensel and she was charged and convicted of disorderly conduct under section 609.72 of the Minnesota Statutes.[31] The statute states:

> 609.72. Disorderly conduct
> Subdivision 1. Crime. Whoever does any of the following in a public or private place, including on a school bus, knowing, or having reasonable grounds to know that it will, or will tend to, alarm, anger or disturb others or provoke an assault or breach of the peace, is guilty of disorderly conduct, which is a misdemeanor: (1) engages in brawling or fighting; or (2) disturbs an assembly or meeting, not unlawful in its character; or (3) engages in offensive, obscene, abusive, boisterous, or noisy conduct or in offensive, obscene, or

22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Hensel*, 874 N.W.2d at 248–49.
28. *Id.* at 249.
29. *Id.*
30. *Hensel*, 901 N.W.2d at 169.
31. *Id.* (specifically, Hensel was charged under MINN. STAT. § 609.72 subdiv. 1(2)).

> abusive language tending reasonably to arouse alarm, anger, or resentment in others.[32]

The text of the 2017 version of section 609.72 is substantially identical to the disorderly conduct statute created by the legislature in 1963.[33] Prior to 1963, there was no distinct crime in Minnesota known as disorderly conduct at common law.[34] Until 1953, Minnesota had no statute specifically addressing disorderly conduct at all.[35] However, a 1953 statute formally introduced the concept of disorderly conduct to Minnesota law, but only in the narrow context of "brawling and fighting."[36] Drafters of the 1963 predecessor to section 609.72 expanded on this narrow definition of disorderly conduct to include a large array of activities so that the 1963 statute covered "the instances which it is believed state law should cover . . . as specifically as the nature of the subject permits."[37]

Within this development, it is important to note that the drafters included a negligence standard in the 1963 statute, allowing for prosecution where a court concludes that a defendant had reasonable grounds to know that the alleged behavior would tend to disturb, arouse alarm or anger, or raise resentment in others.[38] The drafters of the statute reasoned that a negligence standard was "but an application of the principle that criminal liability should be based on fault."[39]

Minnesota state and federal courts often determine that section 609.72 is overbroad due to the extent of actions that qualify as disorderly conduct, the statute's specific inclusion of the term

32. MINN. STAT. § 609.72 (2017).

33. MINN. STAT. § 609.72 (1963), https://www.revisor.mn.gov/laws/1963/0/Session+Law/Chapter/753/pdf/ [https://perma.cc/YS4U-XBWG].

34. *See* MINN. STAT. ANN. § 609.72 (West 2018), advisory committee comment (1963) ("Some of the acts now included by statute in this category [originally] fell under the general heading of breaches of the peace, including fighting or causing disturbances which would tend to provoke fighting among those present.").

35. *Id.*

36. MINN. STAT. § 615.17 (1953) (repealed by Criminal Code of 1963, ch. 753, § 17, 1963 Minn. Laws 1246**)** ("Every person who engages in brawling or fighting, shall be guilty of disorderly conduct, herein defined to be a misdemeanor, and upon conviction thereof, shall be punished by a fine of not to exceed $100 or by imprisonment in the county jail for not to exceed 90 days.").

37. MINN. STAT. ANN. § 609.72 (West 2018), advisory committee comment (1963).

38. MINN. STAT. § 609.72 (1963).

39. MINN. STAT. ANN. § 609.72 (West 2018), advisory committee comment (1963).

"language," and the law's subjective negligence standard.[40] Accordingly, employing narrowing judicial constructions to render the disorderly conduct statute constitutional is a well-established practice in Minnesota jurisprudence.[41]

In convicting Hensel under section 609.72, the district court followed this pattern, and employed a narrowing construction to render the disorderly conduct statute constitutional.[42] There, Hensel pleaded not guilty and also moved to dismiss the charge on First Amendment grounds, yet the court denied the motion.[43] The district court held that while the statute was overbroad as written, it could be rendered constitutional through a narrowing construction that

40. *See Baribeau v. City of Minneapolis,* 596 F.3d 465, 476–77 (8th Cir. 2010); *City of Little Falls v. Witucki,* 295 N.W.2d 243, 244–45 (Minn. 1980); *In re S.L.J.,* 263 N.W.2d 412, 419 (Minn. 1978); *City of St. Paul v. Mulnix*, 304 Minn. 456, 232 N.W.2d 206, 207 (1975); *In re Welfare of T.L.S.,* 713 N.W.2d 877, 880–81 (Minn. Ct. App. 2006); *In re Welfare of M.A.H.,* 572 N.W.2d 752, 756–57 (Minn. Ct. App. 1997); *see also In re* Welfare of K.C.H., No. A05-1016, 2006 WL 920538, at *2 (Minn. Ct. App. Apr. 11, 2006) (finding error in a district court's delinquency adjudication of a minor under section 609.72, subdivision 1(3) for use of obscenity at school); *cf. State v. McCarthy,* 659 N.W.2d 808, 810–11 (Minn. Ct. App. 2003) (discussing the analytical process by which courts determine whether evidence to support a charge of disorderly conduct is sufficient).

41. *See Baribeau,* 596 F.3d at 475–79 (holding that the statute was subject to narrowing construction, as applied to expressive conduct, requiring proof that an offender intended to use fighting words, or an expression inflicting injury or tending to incite an immediate breach of the peace); *Witucki,* 295 N.W.2d at 245 (finding that a city disorderly conduct ordinance—similar to section 609.72, which proscribed engaging in offensive, obscene, or abusive language or in boisterous and noisy conduct tending reasonably to arouse alarm, anger, or resentment—was properly interpreted to be limited to proscribing only fighting words); *S.L.J.,* 263 N.W.2d at 419 (holding that the court could uphold the statute's constitutionality by construing it narrowly to refer only to fighting words); *Mulnix*, 232 N.W.2d at 207 (finding that the law is applicable only to criminal conduct or activities such as fighting words, and not to activities that are constitutionally protected); *T.L.S.,* 713 N.W.2d at 881 (holding that the disorderly conduct statute prohibits only fighting words as applied to speech content); *K.C.H.*, 2006 WL 920538, at *2 (holding that conduct alleged did not constitute fighting words as required for conviction); *McCarthy,* 659 N.W.2d at 810–11 (finding that conviction for disorderly conduct based only on a defendant's words depends upon a fighting words construction); *M.A.H.,* 572 N.W.2d at 757 (holding that speech must constitute fighting words to support a charge under the disorderly conduct statute).

42. 901 N.W.2d 166, 169–70 (Minn. 2017).

43. State v. Hensel, 874 N.W.2d 245, 249 (Minn. Ct. App. 2016), *rev'd*, 901 N.W.2d 166 (2017).

required proving "the disturbance . . . was caused by defendant's conduct itself and not the content of the activity's expression."[44]

The case was tried before a jury, and Hensel requested a jury instruction explaining that if her conduct consisted only of expressive conduct, the jury "must find that the expressive conduct constituted fighting words to find her guilty."[45] Hensel also requested an instruction "that would have precluded the jury from finding her guilty if her disturbing conduct was inseparable from protected expression."[46] The district court denied these requests for jury instructions, reasoning that the First Amendment issues Hensel raised were legal issues for the court, rather than the jury, to decide.[47] Ultimately, the jury returned a guilty verdict, and the district court sentenced her to fifteen days of stayed jail time and one year of unsupervised probation.[48]

Hensel appealed the decision.[49] The Minnesota Court of Appeals, like the district court, held that the statute was constitutional, but not because of any narrowing construction.[50] Rather, the court dismissed arguments to the contrary, and ruled that the statute was a time, place, and manner restriction, and therefore, was not subject to either overbreadth analysis or consideration of any narrowing construction.[51] First, the court of appeals rejected Hensel's argument that the statute was unconstitutionally vague, holding that section 609.72 was "neither unique to Minnesota nor of recent vintage. And such laws are generally construed to 'proscribe only those disruptive physical actions and verbal utterances that are in violation of the normal customs and rules of governance, implicit or explicit, of the meeting.'"[52]

Next, the court of appeals effectively side-stepped Hensel's challenge that the statute was unconstitutionally overbroad.[53] Although the court acknowledged the statute was potentially

44. *Hensel*, 901 N.W.2d at 169; *Hensel*, 874 N.W.2d at 249.
45. *Hensel*, 874 N.W.2d at 249.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.* at 253.
51. *Hensel*, 901 N.W.2d 166, 170 (Minn. 2017); *also see Hensel*, 874 N.W.2d at 253.
52. *Hensel*, 874 N.W.2d at 252 (citing 24 AM. JUR. 2D *Disturbing Meetings* § 1 (2008)); *see also* State v. Linares, 655 A.2d 737, 744 (Conn. 1995).
53. 874 N.W.2d at 253.

overbroad on constitutional grounds, due to "[t]he fact that speech and expressive conduct are implicated," the court decided that the overbreadth analysis was secondary to considering whether the statute was subject to application of the test for "time, place, or manner restrictions articulated by the United States Supreme Court."[54] That test holds that "[t]ime, place, or manner restrictions are 'valid provided that they are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.'"[55]

In applying this standard, the court noted that Hensel did not dispute that section 609.72 is content-neutral.[56] Further, the court identified two significant government interests protected by the statute, including the ability of governmental officials to do the work of governing,[57] and the rights of all citizens to meet and participate in government.[58] Continuing on this path, the court held that the statute was narrowly tailored.[59] The court reached this decision because the statute applies in the very limited context of disturbance of lawful assemblies or meetings, and therefore is "reasonably understood to reach only conduct (including speech) that would be expected to interfere with the ability to conduct a meeting," and "the statute penalizes only conduct that is *intended* to cause a disturbance."[60]

54. *Id.* (citing *Clark v. Cmty. for Creative Non-Violence,* 468 U.S. 288, 293 (1984)).

55. *Id.* (quoting *Clark,* 468 U.S. at 293).

56. *Id.*

57. *Id.* (citing State v. *Linares, 655 A.2d 737, 750*–51 (Conn. 1995) (recognizing governmental interest in prohibiting interferences with state general assembly); *Smith–Caronia v. United States, 714 A.2d 764, 767 (D.C. 1998)* (recognizing government interest in not allowing persons to "delay, impede, or otherwise disrupt the orderly processes of the legislature which represents all Americans"); *State v. Cephus, 830 N.E.2d 433, 439 (Ohio Ct. App. 2005)* (identifying significant governmental interest as ability of government officials to "conduct official business in an orderly manner without interference or disruption")).

58. *Id.* at 253–54 (citing *In re Kay, 464 P.2d 142, 147 (Cal. 1970)* ("The constitutional guarantees of the free exercise of religious opinion, and of the rights of the people peaceably to assemble and petition for redress of grievances, would be worth little if outsiders could disrupt and prevent such a meeting in disregard of the customs and rules applicable to it."); *Morehead v. State, 807 S.W.2d 577, 580 (Tex. Crim. App. 1991)* ("[W]e have no doubt that the State has a legitimate, even compelling, interest in ensuring that some individuals' unruly assertion of their rights of free expression does not imperil other citizens' First Amendment freedoms.")).

59. *Id.* at 254.

60. *Id.* (parenthetical and emphasis in original).

Finally, the court held that the statute leaves open ample alternative channels of communication, because "[c]itizens like Hensel are free to communicate their dissatisfaction with their government in a variety of ways, as long as those communications do not disturb lawful meetings."[61] Having determined that the statute passed the test for time, place, and manner restrictions, the court went on to reject Hensel's final argument, that the statute must be narrowly construed to reach only fighting words.[62] Thus, the court extinguished all of Hensel's constitutional claims.[63]

Ultimately, the Minnesota Court of Appeals turned to the evidence and found it sufficient to support Hensel's conviction, though the court noted that the evidence was "not overwhelming."[64] The court stated, "The jury could have reasonably found that Hensel's conduct prevented the council from conducting its meeting and that she either knew or had reasonable grounds to know that her conduct would disturb the meeting."[65] Thus, the Minnesota Court of Appeals affirmed the district court's ruling.[66]

B. The Minnesota Supreme Court's Decision

The Minnesota Supreme Court granted Hensel's petition for review of the disorderly conduct statute's constitutionality.[67] The court ultimately reversed Hensel's conviction and invalidated section 609.72, subdivision 1(2), finding the statute was substantially overbroad and not readily susceptible to any reasonable narrowing construction that might render the law constitutional.[68] As to the overbreadth issue, *Hensel*'s majority and dissent agreed that the statute was overbroad because it prohibited too much constitutionally-protected conduct.[69] Hence, although compelling

61. *Id.*

62. *Id.* at 255 ("[W]e reject Hensel's assertion that Minn. Stat. § 609.72, subdiv. 1(2), must be narrowly construed to reach only fighting words.").

63. *Id.* at 255.

64. *Id.* at 257.

65. *Id.*

66. *Id.*

67. 901 N.W.2d 166, 169 (Minn. 2017).

68. *Id.*

69. *Id.* at 175 (Stras, J., majority opinion) ("Having concluded that the statute suffers from substantial overbreadth, the remaining question is how to remedy the constitutional violation."); *Id.* at 181 (Anderson, J., dissenting) ("I agree with the court that the disorderly conduct statute, Minn. Stat. § 609.72, subd. 1(2) (2016), is overbroad as written."). While agreeing the statute was overbroad, the dissenting

issues of expressive conduct and First Amendment protections permeated this decision, the true crux of this case for the court was determining the proper limits of the judicial power to salvage otherwise unconstitutional legislation through narrowing constructions.[70]

Although the majority and dissent reached the same conclusion regarding the general overbreadth of the statute, their disagreement as to whether the statute's overbreadth was substantial foreshadows the court's contrasting positions on the proper limits of narrowing construction.[71] In the majority opinion, the court delineated the boundaries of an overbreadth challenge, stating, "An overbreadth challenge is a facial attack on a statute in which the challenger must establish that 'a substantial number of [a statute's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'"[72] Further, the majority stated that "[t]he rationale for allowing an overbreadth challenge, even when a statute is constitutional as applied in a particular circumstance, is that enforcement of an overbroad law chills protected speech, which 'inhibit[s] the free exchange of ideas.'"[73] Applying this standard, and the stated rationale, the majority concluded that section 609.72, subdivision 1(2), was overbroad because "in addition to regulating expressive conduct, the disturbance-of-a-meeting-or-assembly statute covers protected speech as well."[74]

The majority then assessed whether the overbreadth was substantial, stating, "A statute is not substantially overbroad merely because 'one can conceive of some impermissible applications.'"[75] To be substantially overbroad, a statute must "prohibit[] a substantial amount of constitutionally-protected speech."[76] Here, the majority turned to the plain language of the statute and concluded that the disorderly conduct "statute presents us with a 'criminal prohibition of

opinion identified a narrowing construction it believed would prevent the need for invalidation. *See id.*

70. *Id.* at 175.

71. *See id.*

72. *Id.* at 170 (quoting *United States v. Stevens, 559 U.S. 460, 473 (2010)).*

73. *Id.* at 170 (citing *United States v. Williams, 553 U.S. 285, 292 (2008)).*

74. *Id.* at 171 (noting influence of State v. Machholz, 574 N.W.2d 415, 419 (Minn. 1998)) ("Based on *Machholz*, therefore, we reject the State's characterization of the statute as regulating only unprotected, nonexpressive conduct.").

75. *Id.* at 172 (quoting *Williams*, 553 U.S. at 303).

76. *Id.* at 172 (quoting State v. Washington-Davis, 881 N.W.2d 531, 539 (Minn. 2016)).

alarming breadth.'"[77] The majority's first concern was that even negligent activity was criminalized by the mens rea element within the statute's introductory clause.[78] Second, the majority assessed the actus reus element, which "prohibits any act that 'disturbs an assembly or meeting,'" and determined that such language was excessively broad.[79] Finally, the majority focused on the words "disturb" and "meeting," finding that neither term places any meaningful limitation on the statute's scope.[80] Hence, the majority concluded the statute was substantially overbroad, holding that this determination was "consistent with the weight of authority from around the country."[81]

In contrast, the dissent asserted that the statute was not substantially overbroad.[82] The manner in which the dissent supported this argument was an essential element in making this case so compelling, because it opened the door to the crux of the argument in *Hensel*: whether the statute at hand was simply too broad to reel in, as the majority ultimately decided, or whether the statute could be narrowly construed to a constitutionally permissible reach, as the dissent asserted.[83] Here, the dissent argued that the statute was not impermissibly overbroad, but this argument was based on a hypothetical, narrowly-construed version of the statute that the dissent contemplated creating, rather than the text of the statute

77. *Id.* at 172 (quoting *Stevens, 559 U.S. at 474).*

78. *Id.* at 172.

79. *Id.* (quoting MINN. STAT. § 609.72, subdiv. 1(2) (2016)).

80. *Id.*

81. *Id.* at 173. For a comparison, the court provided examples from several other jurisdictions addressing similarly situated statutes involving similar phrasings. *See, e.g.*, *In re Kay*, 464 P.2d 142, 146, 149 (Cal. 1970) (concluding that a statute prohibiting "willfully disturb[ing] or break[ing] up any assembly or meeting, not unlawful in its character," as literally applied, violated the First Amendment due to overbreadth); *State v. Fielden*, 629 S.E.2d 252, 254, 256 (Ga. 2006) (invalidating a statute on First Amendment grounds that prohibited "recklessly or knowingly commit[ting] any act which may reasonably be expected to prevent or disrupt a lawful meeting, gathering, or procession" (citation omitted) (internal quotation marks omitted)); *State v. Schwing*, 328 N.E.2d 379, 383, 385 (Ohio 1975) (holding that a provision stating that "no person shall willfully interrupt or disturb a lawful assemblage of persons" was unconstitutionally overbroad absent a narrowing construction).

82. *Id.* at 185 (Anderson J., dissenting) (concluding "[t]he statute is not facially overbroad as narrowly construed").

83. *See id.* at 182–185.

itself.[84] The narrowing construction proposed by the dissent would limit the application of the statute to situations where "an individual, through conduct, not speech, disturbs an assembly or meeting, not unlawful in its character, knowing that the conduct of the individual will, or will tend to, alarm, anger or disturb others or provoke an assault or breach of the peace."[85] Critically, the dissent concluded that this construction, as opposed to the statute itself, was not substantially overbroad, stating, "Under the narrowing construction described above, the overbreadth is not substantial in relation to the statute's legitimate sweep."[86]

Accordingly, the dissent's conclusion as to overbreadth ultimately depended on the position that "the statute, viewed as a whole, was readily susceptible to a narrowing construction . . . ."[87] On this point, the dissent argued that the court had previously used narrowing constructions where statutory language contained the words "disturbance" and "disturb."[88] Additionally, the dissent proclaimed that the statute was open to a narrowing construction because "reading the disorderly conduct statute as a whole reveals a repeated emphasis on conduct, not the content of speech."[89]

The dissent's willingness to narrowly construe the statute, despite the fact that doing so required the addition and deletion of significant statutory text, was rooted in precedent that compels courts to "invalidate a statute for facial overbreadth only 'as a last resort' when the overbreadth is 'substantial'"[90] because "[i]nvalidating a statute is strong medicine that this court does not hastily prescribe."[91] Thus, facial invalidation is appropriate only when "the words of the law simply leave no room for a narrowing construction . . . [and] in all

84. *Id.* at 183.

85. *Id.*

86. *Id.* at 185 (citing State v. Washington-Davis, 881 N.W.2d 531, 539 (Minn. 2016). *"'A statute should only be overturned as facially overbroad when the statute's overbreadth is substantial.'" Id. at 184 (quoting* State v. Machholz, 574 N.W.2d 415, 419 (Minn. 1998)).

87. *Id.* at 183.

88. *Id.* at 182. The court adopted a narrowing construction of an ordinance that used the word "disturbance" in *Mulnix*. City of St. Paul v. Mulnix, 304 Minn. 456, 458–459, 232 N.W.2d 206, 207–08 (1975). Similarly, the court narrowly construed a statute that used the word "disturb" in *State v. Hipp*. 298 Minn. 81, 82, 86, 213 N.W.2d 610, 612, 614 (1973).

89. *Hensel*, 901 N.W.2d at 182.

90. *Id.* at 181 (quoting State v. Machholz, 574 N.W.2d 415, 419 (Minn. 1998)).

91. *Id.* (quoting State v. Crawley, 819 N.W.2d 94, 105 (Minn. 2012)).

its applications the law creates an unnecessary risk of chilling free speech."[92] The centrality of the duty against invalidation to the dissent's position is demonstrated by the fact that it is the first and most emphatic point the dissenting opinion made.[93] Adhering to this strict last-resort approach, the dissent held that the statute's plain meaning left it open to a narrowing construction,[94] that courts are compelled to use such construction to avoid invalidating the law whenever possible,[95] and that it was possible to do so in this case.[96]

Hence, we arrive at the core of the argument in *Hensel*: whether section 609.72, subdivision 1(2) is readily susceptible to a narrowing construction that might spare invalidation.[97] In contrast to the dissent's willingness to dramatically edit the language of the statute, the majority refused to adopt any of the narrowing constructions proposed to the court because they each required an unreasonable and significant departure from the statute's plain meaning.[98] Unlike the dissent, which highlighted the judicial duty against invalidating legislation, the majority essentially side-stepped adherence to this duty.[99] Instead, the majority focused exclusively and forcefully on why the statute was not readily susceptible to the narrowing constructions proposed by Hensel, the State, or the dissent.[100]

First, the court rejected a fighting-words construction proposed by Hensel because the statute does not mention fighting words or the incitement to an immediate breach of the peace.[101] The court concluded that grafting a fighting-words limitation onto the statute "would require us to 'perform[] . . . plastic surgery upon the face of the [statute],' rather than just adopting an alternative, reasonable construction of the statute's actual words."[102] Accordingly, the court

92. *Id.* (quoting *Crawley*, 819 N.W.2d at 105).
93. *See id.*
94. *Id.* at 182 ("[B]ut the breadth of the word 'disturbs' does not prevent us from adopting a narrowing construction.").
95. *Id.* at 181.
96. *Id.* at 183.
97. *See id.*
98. *Id.* at 176–77.
99. *See id.*
100. *See id.*
101. *Id.* at 176.
102. *Id.* at 176–77 (quoting *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 153 (1969)).

discarded Hensel's proposed fighting-words construction of the statute.[103]

Next, the majority refused to adopt the State's proposed construction, which would distinguish content from conduct, holding that the statute itself was not readily susceptible to this construction because such a limitation would require adding the words "so long as the disturbance is solely caused by the conduct and not the content of the expression" to the text of the statute.[104] Finding nothing in the statute's text to suggest such a distinction, the court reasoned that a content-conduct construction "would require us to rewrite the statute, not reinterpret it."[105] Thus, the court held that the statute was not readily susceptible to the content-conduct narrowing construction suggested by the State.[106]

Finally, the court rejected a third narrowing construction suggested by the dissent, that would modify the statute by both adding a content-conduct limitation and excising the negligent mens rea standard.[107] In rejecting this proposal, the majority stated:

> If we were to adopt the dissent's narrowing construction, then it is difficult to imagine any statute that would *not* be amenable to a narrowing construction, and therefore to conceive of *any* statute that could be invalidated on overbreadth grounds, regardless of its reach. After all, the shave-a-little-off-here and throw-in-a-few-words-there statute on which the dissent eventually settles may well be a more sensible statute, but at the end of the day, it bears little resemblance to the statute that the Legislature actually passed.[108]

Thus, the majority held that the statute was not readily susceptible to any of the proposed narrowing constructions, and took a position of restraint in exercising the power of judicial construction to save constitutionally-flawed legislation.[109] As to the proper remedy, the court stated, "If no reasonable narrowing construction remedies the statute's overbreadth problem, then the remaining

103. *Id.* (quoting United States v. *Stevens, 559 U.S. 460, 480 (2010))* ("[R]ewriting a statute to 'conform it to constitutional requirements' would constitute a 'serious invasion of the legislative domain.'").

104. *Id.* at 178.

105. *Id.*

106. *Id.* at 179.

107. *Id.* at 179.

108. *Id.* at 180 (emphasis in original).

109. *Id.* at 180–81.

option is to invalidate the statute."[110] Accordingly, the Minnesota Supreme Court reversed and remanded the decision of the court of appeals to the district court with the instruction to vacate Hensel's conviction.[111]

III. CONFLICTING AUTHORITY REGARDING THE NARROWING CONSTRUCTION OF STATUTES THAT INFRINGE ON FIRST AMENDMENT PROTECTIONS

A. Support for Unrestrained Narrowing Construction

In *Hensel*, the majority and the dissent grounded the limits of susceptibility to narrowing construction in conflicting precedent.[112] For its part, the dissent rooted its unbridled position regarding narrowing construction of legislation that is unconstitutional on First Amendment grounds in precedent modeled on *Chaplinsky v. New Hampshire*,[113] wherein the United States Supreme Court narrowly construed a disorderly conduct statute to render it constitutional.[114] In the context of the *Hensel* decision, *Chaplinsky* warrants examination because the case enshrined an influential form of narrowing construction known as the fighting-words doctrine.[115] The fighting-words doctrine set a remarkably low bar regarding a statute's reasonable susceptibility to narrowing construction, and thereby sanctioned, and perhaps even encouraged, a trail of subsequent statutory resurrections that required excessive judicial rewrites of constitutionally-overbroad legislation.[116]

Chaplinsky, a member of a sect of Jehovah's Witnesses, was distributing literature of his sect to people on the streets of Rochester, New Hampshire on a busy Saturday afternoon.[117] Chaplinsky's message aggravated local citizens, who complained to the City

110. *Id.* at 175 (stating that when "the words of the [law] simply leave no room for a narrowing construction . . . this court will completely invalidate it") (quoting State v. Crawley, 819 N.W.2d 94, 105 (Minn. 2012)).

111. *Id.* at 181.

112. *See id.*

113. 315 U.S. 568 (1942). The *Hensel* dissent grounds its position in precedent modeled on *Chaplinsky*. *See* State v. Crawley, 819 N.W.2d 94, 107 (Minn. 2012); State v. Machholz, 574 N.W.2d 415 (Minn. 1998); *In re* R.A.V., 464 N.W.2d. 507 (Minn. 1991); *In re S.L.J.*, 263 N.W.2d 412 (Minn. 1978); State v. Hipp, 298 Minn. 81, 213 N.W.2d 610 (1973).

114. *See Chaplinsky*, 315 U.S. at 568.

115. *Id.*

116. *Id.*

117. *Id.* at 569–70.

Marshal that "Chaplinsky was denouncing all religion as a 'racket.'"[118] The City Marshal affirmed Chaplinsky's legal right to engage in such behavior, but warned Chaplinsky that the crowd was getting restless.[119] Sometime later, after the City Marshal departed the scene, Chaplinsky was involved in a disturbance and a nearby traffic officer escorted him to the police station but did not place him under arrest, suggesting that the officer's action may have been protective rather than punitive.[120]

Chaplinsky's case, and the birth of the fighting-words doctrine, hinged on what happened next.[121] On the way to the police station with the traffic officer, Chaplinsky encountered the City Marshal.[122] Chaplinsky testified that he asked the City Marshal to arrest those responsible for the disturbance and that the Marshal cursed him in response.[123] Whether or not the City Marshal cursed Chaplinsky, it is uncontested that Chaplinsky said to the City Marshal, "You are a damned racketeer … and a damned Fascist and the whole government of Rochester are Fascists or agents of Fascists."[124] Having admitted to his utterances, Chaplinsky was ultimately convicted for nothing more than speaking these words to the City Marshal.[125] A convincing defense may have been impossible because, according to the lower court, "neither provocation nor the truth of the utterance would constitute a defense to the charge."[126]

The narrowing construction created by the *Chaplinsky* court required significant contortions that both contradicted and added to the legislative text of the statute at issue, which provided:

> No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to

118. *Id.* at 570.
119. *Id.*
120. *Id.*
121. *Id.* at 569.
122. *Id.* at 570.
123. *Id.*
124. *Id.* at 569–70. It was alleged that Chaplinsky said, "You are a *God* dammed racketeer." Chaplinsky admitted to the remainder of his statements but denied using the word God. *Id.*
125. *See id.*
126. *Id.* at 570.

> prevent him from pursuing his lawful business or occupation.[127]

The *Chaplinsky* Court narrowly construed this statute to "prohibit the face-to-face words plainly likely to cause a breach of the peace . . . including 'classical fighting words,' words . . . equally likely to cause violence, and other disorderly words, including profanity, obscenity and threats."[128] Although this construction saved the statute from constitutional invalidation, the resulting concoction bore little resemblance to the original legislation. By restricting the law's reach to fighting words, the Court's construction eliminated prohibitions on annoyance, noises, and interference with business pursuits, effectively ignoring the bulk of the statute's text.[129] This departure from plain meaning spared invalidating the law, but it undeniably required revising the law, as opposed to merely reinterpreting the existing statutory language.[130]

Nonetheless, this significant revision was endorsed by a unanimous Court, and *Chaplinsky* gave rise to the fighting-words doctrine, whereby thousands of statutes have been narrowly construed in a similar fashion.[131] Yet the impact of *Chaplinsky* goes beyond the fighting-words doctrine itself, because the case enshrined a remarkably low threshold as to whether a statute is reasonably susceptible to a narrowing construction, particularly where state regulation of disorderly conduct is concerned.[132]

In *Chaplinsky's* wake, the Minnesota Supreme Court often adopted a similarly low threshold in determining when a statute was susceptible to a narrowing construction.[133] Accordingly, the court

127. *Id.* at 569.

128. *Id.* at 573.

129. *Id.* at 569.

130. *Id.* at 573.

131. A Westlaw search in November 2018 for "fighting words doctrine" yields over 46,000 results. Case search, WESTLAW, https://1.next.westlaw.com (search for "Fighting Words Doctrine"). As of November 2018, *Chaplinsky* is cited by approximately 8,900 references, including just under 2,000 cases. Case search, WESTLAW, https://1.next.westlaw.com (search for "*Chaplinsky v. State of New Hampshire*, 315 U.S. 568 (1942)").

132. *See, e.g.*, State v. Crawley, 819 N.W.2d 94 (Minn. 2012); *In re* R.A.V., 464 N.W.2d 507 (Minn. 1991); *In re S.L.J.*, 263 N.W.2d 412 (Minn. 1978); City of St. Paul v. Mulnix, 304 Minn. 456, 232 N.W.2d 206 (1975); State v. Hipp, 298 Minn. 81, 213 N.W.2d 610 (1973).

133. *See, e.g.*, *Crawley,* 819 N.W.2d at 105 (construing a statute narrowly by adding two omitted elements of defamation); *In re R.A.V.*, 464 N.W.2d at 511 (construing a statute narrowly by adding a "fighting words" requirement); *In re S.L.J.*,

regularly embraced the practice of heavily editing legislation that reaches protected free speech, even where such judicial revision dramatically alters a law's effect.[134] For example, in *State v. Hipp*, the court narrowly construed an unlawful assembly statute.[135] There, the court both added language regarding the denial or interference with another's right to peaceful use of private or public property without obstruction and introduced a fighting-words element to the unlawful assembly statute, which contained neither limitation within its plain meaning.[136] The *Hipp* court held that such a narrowing construction was supported by the language and intent of the statute, which was directed at regulating conduct as opposed to speech.[137] Further, the court held that "[s]o construed, the statute neither prohibits activity which is merely annoying to others nor invites discriminatory enforcement. It is limited to regulating only criminal conduct or activities, not peaceful protest, general obnoxiousness, or deviant life styles."[138] Accordingly, the court found that, as construed, the statute was not overbroad and therefore was not an infringement on First Amendment protections.[139]

Another example of a low threshold of susceptibility to narrowing construction is *City of St. Paul v. Mulnix*,[140] wherein the court added a fighting words limitation to its narrowing construction, despite acknowledging that the ordinance was "out of date and badly in need of revision."[141] The *Mulnix* court reasoned that relevant cases "suggest to us that the contested ordinance is the type which the United States Supreme Court might strike down as facially vague and overbroad absent some limiting and clarifying interpretation by this

263 N.W.2d at 419 (construing a statute narrowly by adding a "fighting words" requirement); *Mulnix*, 232 N.W.2d at 207 (construing a statute narrowly to apply only to criminal conduct, like "fighting words"); *Hipp*, 213 N.W.2d at 614 (construing a statute narrowly to apply only when three or more people are gathered, and only when a gathering interferes with other individual's enjoyment of private property rights or public facilities).

134. *See Hipp*, 213 N.W.2d at 610; *Mulnix*, 232 N.W.2d at 206; *S.L.J.*, 263 N.W.2d at 412; *R.A.V.*, 464 N.W.2d. at 507; *Crawley*, 819 N.W.2d at 94.

135. 213 N.W.2d at 610.

136. *Id.* at 614.

137. *Id.* at 615.

138. *Id.* at 615 (citing Papachristou v. City of Jacksonville, 405 U.S. 156 (1972)).

139. *Id.* at 615.

140. 232 N.W.2d 206 (1975).

141. *Id.* at 208.

court."[142] Here, much like the dissent's proffered narrowing construction in *Hensel* which eliminated the negligent *mens rea* standard from the disorderly conduct statute, the *Mulnix* court added a requirement that the conduct "actually disturbs," abandoning the "tendency-to-disturb" standard that had previously created legal problems.[143]

Similarly, in *In re Welfare of S.L.J.*,[144] the court cited *Chaplinsky* when adding a fighting words limitation to the same disorderly conduct statute challenged in *Hensel*.[145] Like *Hensel*, *S.L.J.* concluded that section 609.72 was overbroad because it "punishes words that merely tend to 'arouse alarm, anger, or resentment in others' rather than only words 'which by their very utterance inflict injury or tend to incite an immediate breach of the peace.'"[146] The *S.L.J.* court stated that "[s]ince the statute does not satisfy the definition of 'fighting words,' it is unconstitutional on its face."[147] Nonetheless, *S.L.J.* rescued the statute from invalidation through a narrowing construction that appended a fighting-words limitation onto the law.[148] As in *Chaplinsky*, this limitation rendered much of the statute meaningless, including provisions on noisy or boisterous conduct.[149]

This trend of revisionist construction continued in more modern cases, such as *In re R.A.V.*,[150] in which the Minnesota Supreme Court added a fighting words limitation to an overbroad law, despite a lack of support for such an addition within the statutory text, which focused on conduct, not words.[151] In *R.A.V.*, the court reversed and remanded a Ramsey County District Court decision dismissing a charge of disorderly conduct based on the district court's interpretation of the statute as substantially overbroad and impermissibly content-based.[152] The court rejected the district court's overbreadth claim because "the phrase 'arouses anger, alarm or resentment in others' had been construed in earlier state cases to

142. *Id.* at 207.
143. *Id.* at 207–08 (citing Grayned v. City of Rockford, 408 U.S. 104 (1972)).
144. 263 N.W.2d 412 (Minn. 1978).
145. *Id. at 417–18.*
146. *Id.* at 419 (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942)).
147. *Id.* at 419.
148. *Id.*
149. *Id. at 415*.
150. 464 N.W.2d 507 (Minn. 1991), *rev'd sub nom.* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).
151. *Id.* at 510.
152. *Id.* at 508–09.

limit the ordinance's reach to 'fighting words' within the meaning of . . . *Chaplinsky*."[153] However, on certiorari, the Supreme Court of the United States decided that the Minnesota Supreme Court missed the mark by using a fighting words construction, because such a construction did not remedy the potential for content discrimination under the law.[154] Hence, the United States Supreme Court reversed and remanded the decision of the Minnesota Supreme Court, holding that the ordinance, "even as narrowly construed by the State Supreme Court," was overbroad and facially invalid.[155]

State v. Crawley is another recent example of the Minnesota Supreme Court embracing a low threshold as to whether a statute is reasonably susceptible to a narrowing construction.[156] Citing *Chaplinsky*, the *Crawley* court added novel elements to a false-reporting statute that were not supported by the plain meaning of the original legislation, essentially reinventing, rather than merely construing, the existing law.[157] Specifically, the *Crawley* court narrowly construed a statute forbidding false reports of police misconduct, or of crime in general, so that "the statute punishes only speech that meets the Minnesota definition of defamation, an unprotected category of speech."[158] To justify adding the missing defamation elements to the statute, *Crawley* relied on precedent that compels courts to use narrowing constructions to avoid constitutional invalidation of legislation whenever possible.[159] *Crawley* distinguished the overbreadth doctrine as "strong medicine" that has been employed "sparingly."[160] In line with this position, the Minnesota Supreme Court has employed the overbreadth doctrine "with hesitation, and then 'only as a last resort,'" because a holding of facial overbreadth, and the resulting statutory invalidation, should never be invoked "when a limiting construction has been or could be placed on the challenged statute."[161]

Crawley held that, whenever possible, the court should narrowly construe "a law subject to facial overbreadth attack so as to limit its

153. *R.A.V.*, 505 U.S. at 377.
154. *Id. at* 391.
155. *Id.*
156. 819 N.W.2d 94 (Minn. 2012).
157. *Id.*
158. *Id.* at 100.
159. *Id.* at 105.
160. *Id.* (quoting *Broadrick v. Oklahoma,* 413 U.S. 601, 613 (1973)).
161. *Id.* (quoting *Broadrick,* 413 U.S. at 613).

scope to conduct that falls outside First Amendment protection while clearly prohibiting its application to constitutionally protected expression."[162] In a nod to *Chaplinsky*'s precedential heft, *Crawley* specifically pointed to the case as an example to follow in creating narrowing constructions, stating, "The United States Supreme Court generally allows, and even encourages, state supreme courts to sustain the constitutionality of state statutes regulating speech by construing them narrowly to punish only unprotected speech."[163] Based on prior decisions, including *Chaplinsky, S.L.J.*, and *R.A.V.,* the *Crawley* court upheld the constitutionality of the statute by narrowly construing it to punish only defamation, even though the statute itself lacked any legislative text that could support such an interpretation.[164]

The *Crawley* case is particularly interesting because the dissenting opinion in *Crawley* focused on the same concerns that won the day in *Hensel*.[165] This should come as no surprise, because Justice David R. Stras authored both the *Crawley* dissent and the *Hensel* majority opinion.[166] First, the *Crawley* dissent noted the importance of "the canon of constitutional avoidance, which provides that "'[w]here possible, [the court] should interpret a statute to preserve its constitutionality.'"[167] However, the dissent then pointed to reasonable limits on whether a narrowing construction is appropriate, stating that "the canon of constitutional avoidance—like other canons of statutory construction—may not be used to circumvent a statute's plain meaning."[168] Finally, the dissent warned

162. *Id.*

163. State v. Crawley, 819 N.W.2d 94, 105 (Minn. 2012) ("[F]or example, in *Chaplinsky*, the Supreme Court upheld a New Hampshire statute as constitutional because the highest court of New Hampshire authoritatively construed the statute to reach only "fighting words.").

164. *Id.* at 107.

165. *Compare Crawley*, 819 N.W.2d at 116 (Stras, J., dissenting), *with* State v. Hensel, 901 N.W.2d 166, 175–78 (Minn. 2017) (Stras, J., plurality opinion) (relying on *Crawl*ey as precedent and aligning much of their reasoning with that in *Crawley*).

166. *Compare Crawley*, 819 N.W.2d. at 116 (Stras J., dissenting), *with Hensel*, 901 N.W.2d at 169 (Stras, J., plurality opinion).

167. *Crawley*, 819 N.W.2d. at 116 (quoting United States v. Jin Fuey Moy, 241 U.S. 394, 401 (1916)) ("A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.").

168. *Id.* at 116 (quoting FCC v. Fox Television Stations, Inc., 556 U.S. 502, 516 (2009)) (describing the canon of constitutional avoidance as an "interpretive tool, counseling that *ambiguous* statutory language be construed to avoid serious constitutional doubts" (emphasis added)); *see also* George Moore Ice Cream Co. v.

against salvaging statutes that would otherwise be unconstitutional "simply by adding our own limiting language."[169] Accordingly, like the majority in *Hensel*, the dissent in *Crawley* held that rewrites of legislative language accomplished through narrowing constructions that ignore a law's plain meaning are "inconsistent with the proper, limited role of the judiciary."[170]

Hence, the *Hensel* dissent, and those making similar arguments in favor of a low threshold of susceptibility to narrowing construction, draw support from two important precedential legacies: first, the canon of constitutional avoidance; and second, the unbridled license to edit legislation by adding and deleting significant statutory elements, a practice that *Chaplinsky* and the cases in its wake firmly encourage.[171]

B. Support for Restrained Narrowing Construction

The *Hensel* majority underscored precedential limitations on the reach of narrowing construction by requiring a reasonable susceptibility threshold[172] and proscribing judicial rewrites of legislative language.[173] Decisions embracing a high susceptibility threshold can be traced back to *Erznoznik v. City of Jacksonville*, wherein the United States Supreme Court refused a narrowing construction because the plain statutory language was not "easily susceptible of a narrowing construction."[174] The *Erznoznik* Court held against unbridled judicial editing of constitutionally flawed laws, stating, "Where First Amendment freedoms are at stake we have

Rose, 289 U.S. 373, 379 (1933) ("[A]voidance of a [constitutional] difficulty will not be pressed to the point of disingenuous evasion.").

169. 819 N.W.2d. at 116.

170. *Id.* ("The canon of constitutional avoidance comes into play only when, after the application of ordinary textual analysis, the statute is found to be susceptible of more than one construction; and the canon functions *as a means of choosing between them.*"); *Id.* at 117 (citing *Clark v. Martinez,* 543 U.S. 371, 385 (2005)); *see also* United States v. Del. & Hudson Co., 213 U.S. 366, 408 (1909) (prohibiting the application of the canon of constitutional avoidance when a statute is unambiguous and the unambiguous interpretation results in the unconstitutionality of the statute).

171. *See* State v. Hensel, 901 N.W.2d 166, 175 (Minn. 2017).

172. *Id.* at 175 (citing *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 397 (1988)).

173. *Id.* at 176 (citing United States v. Stevens, 559 U.S 460, 464–65, 480–81 (2010)).

174. 422 U.S. 205, 216 (1975).

repeatedly emphasized that precision of drafting and clarity of purpose are essential."[175]

In *City of Houston v. Hill*, the Court held that an ordinance is not susceptible to a narrowing construction if such construction is "at odds with the ordinance's plain meaning, or do[es] not sufficiently limit its scope."[176] *Hill* also held that if "the ordinance in question is plain and unambiguous," then it is "not susceptible to a limiting construction."[177] Further, the *Hill* Court stated that an ordinance "cannot be limited by severing discrete unconstitutional subsections [if] its enforceable portion is unconstitutional in its entirety."[178]

In *Virginia v. American Booksellers Ass'n.*, the Court stated, "It has long been a tenet of First Amendment law that in determining a facial challenge to a statute, if it be 'readily susceptible' to a narrowing construction that would make it constitutional, it will be upheld."[179] Yet the Court pointed out that there must be some restraints on the distance a judicial body can travel in construing a law, stating, "The key to application of [narrowing construction] is that the statute must be 'readily susceptible' to the limitation; we will not rewrite a state law to conform it to constitutional requirements."[180]

In *Reno v. American Civil Liberties Union*, the Court continued to highlight the need for restraining narrowing construction to legislation that is "readily susceptible" to reasonable judicial interpretation.[181] *Reno* stressed the separation of powers concerns inherent in judicial construction of legislative language.[182] The Court emphasized the longstanding nature of such concerns by quoting an 1875 decision, *United States v. Reese*:

> As this Court long ago explained: "It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute

175. *Id.* at 217–18.

176. 482 U.S. 451, 482 n.18 (1987).

177. *Id.* at 452.

178. *Id.*

179. 484 U.S. 383, 397 (1988) (citing *Erznoznik v. City of Jacksonville,* 422 U.S. 205, 216 (1975) (holding that "a state statute should not be deemed facially invalid unless it is not readily subject to a narrowing construction by the state courts")).

180. *Id.*

181. 521 U.S. 844, 884 (1997) (citing *Virginia v. American Bookseller's Ass'n, Inc.,* 484 U.S. 383, 397 (1988)).

182. *See id.*

> the judicial for the legislative department of the government."[183]

The *Reno* Court then touched on the extent to which courts are compelled to render unconstitutional legislation constitutionally acceptable, stating, "In part because of these separation-of-powers concerns, we have held that a severability clause is 'an aid merely; not an inexorable command.'"[184]

In *United States v. Stevens*, the Court welcomed this restrained stance on the proper limits of judicial construction into contemporary jurisprudence by quoting the *Reno* decision: "[T]his Court may impose a limiting construction on a statute only if it is 'readily susceptible' to such a construction."[185] Further, the *Stevens* Court put the spotlight on the separation of powers doctrine, holding, "We 'will not rewrite a . . . law to conform it to constitutional requirements,'[186]…for doing so would constitute a 'serious invasion of the legislative domain,'[187] and sharply diminish Congress's 'incentive to draft a narrowly tailored law in the first place.'"[188] In close step with the restrained position endorsed in *Stevens*, the *Hensel* majority held that a statute is not "readily susceptible" to a narrowing construction if rendering the law constitutional would require rewriting the statute, instead of simply reinterpreting it.[189]

Hensel's restrained approach to construction of overbroad statutes is also consistent with previous Minnesota Supreme Court decisions.[190] In *Thompson v. Estate of Petroff*, the court held that adding language to a statute is impermissible.[191] *Thompson* recognized that "established rules of law are not to be overturned lightly. Nevertheless, when an old rule is found no longer to serve the needs of society, it should be set aside and replaced with one that

183. *See id.* at 897 n.49 (quoting *United States v. Reese,* 92 U.S. 214, 221 (1875)).

184. *Id.* at 897 n.49 (quoting *Dorchy v. Kansas,* 264 U.S. 286, 290 (1924)).

185. 559 U.S. 460, 481 (2010) (quoting *Reno v. American Civil Liberties Union,* 521 U.S. 844, 884 (1997)).

186. *Id.* (quoting *Virginia,* 484 U.S. at 397).

187. *Id.* (citing *United States v. Treasury Employees,* 513 U.S. 454, 479, n.26 (1995)).

188. *Id.* (quoting Osborne v. Ohio, 495 U.S. 103, 121 (1990)).

189. *See Hensel*, 901 N.W.2d 166, 175–76 (Minn. 2017) (citing United States v. Stevens, 559 U.S. 460, 464–65, 480–81 (2010)).

190. *See* County of Dakota v. Cameron, 839 N.W.2d 700 (Minn. 2013); State v. Machholz, 574 N.W.2d 415 (Minn. 1998); *Thompson v. Estate of Petroff*, 319 N.W.2d 400 (Minn. 1982).

191. 319 N.W.2d at 407.

reflects the interests and the will of the people and the demands of justice."[192]

In *State v. Machholz*, the court rejected a narrowing construction because the plain language of the statute was not susceptible to a fighting words limitation since the "statute's language sweeps in a whole spectrum of constitutionally protected activity beyond the category of fighting words.".[193] Due to this substantial overbreadth, and the court's determination that that statute was not readily susceptible to a narrowing construction, the court held the statute was "unconstitutionally overbroad, facially and as applied," and charges against the accused were dismissed.[194]

A final example of a Minnesota Supreme Court decision that limits the boundaries of susceptibility to narrowing construction is *County of Dakota v. Cameron*, in which the court held that each of two proffered narrowing constructions "would require us to violate one of our basic canons of statutory interpretation: we do not add words or phrases to an unambiguous statute."[195]

Recent Minnesota Court of Appeals decisions against judicial rewrites of legislation, such as *State v. Final Exit Network, Inc.*[196] and *State v. Turner*,[197] also lend support to *Hensel*'s restrained position. In *Final Exit*, the court stated, "When a statute addresses only protected speech, a court cannot 'rewrite a . . . law to conform it to constitutional requirements.'"[198] In *Turner*, the court noted the "canon of constitutional avoidance, which requires, if at all possible, the

192. *Id.* (citing *Silesky v. Kelman*, 161 N.W.2d 631, 633 (1968)).

193. 574 N.W.2d 415, 420 (Minn. 1998).

194. *Id.* at 422.

195. 839 N.W.2d 700, 709 (Minn. 2013); *see also* Watson v. St. Paul City Ry. Co., 73 N.W. 400, 517 (Minn. 1897) (refusing to add words to an unambiguous statute).

196. Nos. A13–0563, A13–0564, A13–0565, 2013 WL 5418170, at *6 (Minn. Ct. App. Sept. 30, 2013) (stating "[w]hen a statute addresses only protected speech, a court cannot 'rewrite a . . . law to conform it to constitutional requirements.'" (quoting United States v. Stevens, 559 U.S 460, 481 (2010)); *see also Holder v. Humanitarian Law Project,* 561 U.S. 1, 17 (2010) ("Although this Court will often strain to construe legislation so as to save it against constitutional attack, it must not and will not carry this to the point of perverting the purpose of a statute.").

197. 864 N.W.2d 204, 211 (Minn. Ct. App. 2015) (finding "[t]he state's proffered limiting construction would require [the court] to do more than construe . . . narrowly, it would require a rewrite.").

198. *Final Exit Network, Inc.*, 2013 WL 5418170, at *6 (quoting *Stevens, 559 U.S. at 481).*

judiciary to interpret a statute to 'preserve its constitutionality.'"[199] However, the court went on to affirm that "a limiting construction should be imposed only if an unconstitutional statute is 'readily susceptible to such a construction.'"[200] *Turner* held that a proposed narrowing construction would require rewriting, rather than reinterpreting, the statute.[201] Specifically, the court pointed out that a proper narrowing construction would entail both adding language to the law and striking some text entirely, thus requiring the court to do more than construe the statute narrowly.[202] Accordingly, the court reversed the appellant's conviction, holding that the State failed to provide a functional narrowing construction, and that the statute at issue was "unconstitutionally overbroad and in violation of First Amendment protections and is not susceptible to a narrowing construction."[203]

Finally, *Hensel*'s restrained posture regarding narrowing construction is also consistent with the advice of the Minnesota Practice Series, which outlines fundamental principles that universally encourage restraint in statutory construction.[204] The Series highlights the importance of interpretations based on the plain meaning of statutory text, and notes that plain and unambiguous language should not be further construed.[205] Further, the Series advises that courts should not supply language that the "legislature purposely omits or inadvertently overlooks" and that "the letter of the law shall not be disregarded under the pretext of pursuing the spirit" because "a legislature intends the entire statute to be effective and certain."[206]

199. *Turner*, 864 N.W.2d at 210 (citing *Hutchinson Tech., Inc. v. Comm'r of Revenue,* 698 N.W.2d 1, 18 (Minn. 2005)).

200. *Id.* at 210–11 (quoting *Stevens,* 559 U.S. at 481).

201. *Id.* at 211.

202. *Id*.

203. *Id.*

204. 7 HENRY W. MCCARR & JACK S. NORDBY, MINN. PRAC., CRIMINAL LAW & PROCEDURE § 1:12 (4th ed. 2018) (stating that a statute's words are presumed to be construed according to common usage; courts should always begin construing a statute by giving the words plain meaning; courts should not further consider language that is plain and unambiguous; courts should not provide definitions that legislature purposefully omits).

205. *See id.*

206. *See id.* (referring to presumptions prescribed by section 645.17 for determining the intention of the legislature).

Hence, the legal and historical background regarding the reasonable limits of narrowing construction of overbroad legislation provides substantial support for the majority's restrained position, but the dissent's more unbridled approach is also grounded in significant controlling decisions.[207] The fireworks in *Hensel* arose because the contrasting positions presented in the case are each reinforced by convincing precedential rationales.[208] In the end, however, the *Hensel* majority followed the restrained path embraced by *Stevens*, and ultimately boiled the issue of judicial construction down to a single controlling inquiry: whether a statute's plain meaning reasonably supports a proposed narrowing construction.[209]

IV. ANALYSIS

Hensel shows that defining reasonable limits on narrowing constructions is a daunting endeavor because the positions taken by the majority and the dissent are contradictory, yet each is justified by fundamental doctrinal duties that are rooted in controlling precedent.[210] On one side is the doctrine of constitutional avoidance, which compels courts to employ narrowing constructions that spare facial invalidation whenever possible.[211] On the other side is the separation of powers doctrine, which forbids courts from intruding into the legislative domain via narrowing constructions that amount to revisions and rewrites, rather than reinterpretations, of statutory language.[212] The result of this tension, within the Minnesota Supreme Court, is a trail of inconsistent decisions that oscillate between restrictive and expansive positions on the use of narrowing

207. State v. Hensel, 901 N.W.2d 166, 176–77, 181 (Minn. 2017).

208. *See id.*

209. *See id.* at 176–77.

210. *See id.* at 176–77, 181.

211. *Id.* at 181 (Anderson J., dissenting) (stating invalidation is "strong medicine that this court does not hastily prescribe") (quoting State v. Crawley, 819 N.W.2d 94, 105 (Minn. 2012)). The *Crawley* court also held that courts should "narrowly construe statutes to avoid facial invalidity whenever possible." *Crawley*, 819 N.W.2d at 105. *Crawley* further specified that invalidation for facial overbreadth should be considered a "last resort" that should be employed only when "the words of the [law] simply leave no room for a narrowing construction . . . [and] in all its applications the [law] creates an unnecessary risk of chilling free speech." *Id.*

212. *Hensel*, 901 N.W.2d at 176–77 (requiring that a statute is "readily susceptible" to a narrowing construction, and stating that narrowing constructions that amount to rewrites of statutory language "constitute a 'serious invasion of the legislative domain.'") (quoting *Stevens*, 559 U.S. at 480).

constructions.[213] At times, the court requires a reasonable susceptibility threshold, and rejects constructions that do not align with the plain meaning of statutory text.[214] At other times, the court is laser-focused on the duty to avoid invalidation and embraces constructions that substantially change statutory language and effect.[215]

The erratic nature of these decisions demonstrates the difficult task courts face in deciding whether a statute is readily subject to a narrowing construction.[216] *Hensel* indicates that the Minnesota Supreme Court, at least for the meantime, endorses a restrained rather than unbridled position on narrowing constructions, requiring a reasonable threshold of susceptibility.[217] This restrained position is in accord with the weight of United States Supreme Court precedent on the limits of narrowing constructions.[218] Despite the duty created

213. *See* County of Dakota v. Cameron, 839 N.W.2d 700 (Minn. 2013) (employing a restrained construction); *Crawley*, 819 N.W.2d at 94 (employing an expansive construction); State v. Machholz, 574 N.W.2d 415 (Minn. 1998) (employing a restrained construction); *In re* R.A.V., 464 N.W.2d 507 (Minn. 1991) (employing an expansive construction); *Thompson v. Estate of Petroff*, 319 N.W.2d 400 (Minn. 1982) (employing a restrained construction); *In re S.L.J.*, 263 N.W.2d 412 (Minn. 1978) (employing an expansive construction); City of St. Paul v. Mulnix, 304 Minn. 456, 232 N.W.2d 206 (1975) (employing an expansive construction); State v. Hipp, 298 Minn. 81, 213 N.W.2d 610 (1973) (employing an expansive construction).

214. *See Crawley*, 819 N.W.2d at 104–07 (narrowly construing a statute by adding two omitted elements of defamation); *S.L.J.*, 263 N.W.2d at 419–20 (narrowly construing a statute by adding a "fighting words" requirement); *Mulnix*, 304 Minn. at 459, 232 N.W.2d at 207 (narrowly construing a statute to apply only to criminal conduct, like "fighting words"); *Hipp*, 298 Minn. at 89, 213 N.W.2d at 615 (narrowly construing a statute to apply only when three or more people are gathered, and only when a gathering interferes with other individual's enjoyment of private property rights or public facilities).

215. *See Cameron*, 839 N.W.2d at 700; *Machholz*, 574 N.W.2d at 415; *Thompson*, 319 N.W.2d at 400.

216. *See Cameron*, 839 N.W.2d 700 (employing a restrained construction); *Crawley*, 819 N.W.2d 94 (employing an expansive construction); *Machholz*, 574 N.W.2d 415 (employing a restrained construction); *R.A.V.*, 464 N.W.2d. at 507 (employing an expansive construction).

217. *See* Hensel, 901 N.W.2d 166, 181 (Minn. 2017).

218. A long line of Supreme Court decisions stand against unrestrained narrowing construction and impermissibly rewriting legislation to avoid invalidating an overbroad law on constitutional grounds. *See* United States v. Stevens, 559 U.S 460, 481 (2010); Ayotte v. Planned Parenthood of N. New England, 546 U.S. 320 (2006); Reno v. Am. Civil Liberties Union, 521 U.S. 844, 883 (1997); Salinas v. United States, 522 U.S. 52 (1997); *United States v. Treasury Emp's,* 513 U.S. 454, 479 (1995); Chapman v. United States, 500 U.S. 453 (1991); *Virginia v. Am. Booksellers Ass'n Inc.*,

by the cannon of constitutional avoidance, controlling decisions on this issue demonstrate that courts must not engage in judicial rewrites that are not supported by the plain meaning of statutory text.[219]

In addition to conforming with United States Supreme Court precedent, judicial restraint in statutory construction has tangible public policy benefits. For example, a restrained approach is critical to preserving a proper separation of powers within our tripartite system of government because requiring a reasonable susceptibility threshold limits judicial intrusion into the legislative domain.[220] When courts myopically focus on the cannon of constitutional avoidance without due consideration of the requirement that a statute's plain meaning supports a proposed narrowing construction, the judiciary is effectively empowered to create new law and to modify old law, both of which are activities properly restricted to elected officials under the Minnesota State Constitution and the Constitution of the United States.[221]

Additionally, judicial restraint regarding narrowing constructions ultimately leads to better legislation. When courts refuse to correct flawed statutes through the addition and deletion of substantial statutory text there is greater incentive for legislators to produce law that is both unambiguous and constitutional.[222]

484 U.S. 383, 397 (1988); City of Houston v. Hill, 482 U.S. 451 (1987); United States v. Albertini, 472 U.S. 675, 680 (1985); Erznoznik v. City of Jacksonville, 422 U.S. 205, 216 (1975); Aptheker v. Sec. of State, 378 U.S. 500, 515–16 (1964).

219. *Id*.; *see, e.g.*, Northland Family Planning Clinic, Inc. v. Cox, 487 F.3d 323, 335 (6th Cir. 2007) ("[T]he cannon of constitutional avoidance does not apply if the statute is not 'genuinely susceptible to two constructions.'" (quoting Almendarez–Torres v. United States, 523 U.S. 224, 238 (1998)).

220. United States v. Stevens, 559 U.S. 460, 481 (2010); *Treasury Emp's,* 513 U.S. at 479; State v. Turner, 864 N.W.2d 204, 211 (Minn. Ct. App. 2015) (stating that "[r]emoving language, as argued by the state, and adding language, as required by law, would require a rewrite of the statute and 'would constitute a serious invasion of the legislative domain.'") (quoting *Stevens*, 559 U.S. at 481 (2010)).

221. *See* U.S. CONST, art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives."); MINN. CONST. art. III, § 1 ("The powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution.").

222. Osborne v. Ohio, 495 U.S. 103, 121 (1990) (stating that "so long as the offending statute was narrowed before the final appeal . . . then legislatures would

Moreover, by refusing to extensively edit poorly drafted legislation, courts save the system tremendous resources otherwise wasted on the inefficiencies that unclear statutory language creates, such as the high number of appeals related to narrowing constructions.[223]

Further, a restrained approach fosters legislative accountability, an essential ingredient in a functional democracy. Legislators should be held responsible for the laws they write, yet it is impossible to hold lawmakers accountable when statutory text and effect are modified by unelected courts employing a unique form of discretion that blurs the lines ordinarily demarking a robust separation of powers.[224]

Moreover, unbridled narrowing constructions are dangerous to the public's faith in an impartial judicial branch. Narrowing constructions that are not supported by statutory text present an unwarranted opportunity for judicial partiality that is not present in cases where the plain meaning of statutory language is merely interpreted, rather than rewritten. Whether such partiality is actual or exists only in the perception of the public or the parties before the court, unrestrained narrowing constructions that disregard plain meaning muddy the waters of a legal system that champions a clear, predictable, and impartial application of the law.

Finally, and perhaps most critically, a restrained approach to narrowing constructions moderates the chilling effect on free

have significantly reduced incentive to stay within constitutional bounds in the first place. When one takes account of those overbroad statutes that are never challenged, and of the time that elapses before the ones that are challenged are amended to come within constitutional bounds, a substantial amount of legitimate speech would be 'chilled' . . . ." (quoting *Massachusetts v. Oakes,* 491 U.S. 576, 586 (1989)); *see also Erznoznik*, 422 U.S. at 217–18 (holding that an "ordinance does not satisfy the rigorous constitutional standards that apply when government attempts to regulate expression. Where First Amendment freedoms are at stake we have repeatedly emphasized that precision of drafting and clarity of purpose are essential").

223. A Westlaw search for federal court of appeals cases that discuss narrowing constructions yields 83 results in the calendar year since the September 13, 2017 Minnesota Supreme Court decision in *Hensel*. Case search, WESTLAW, https://1.next.westlaw.com (search for "narrowing construction," filtered by federal circuit courts between Sept. 13, 2017 and Sept. 13, 2018).

224. Christopher P. Lu, *The Role of State Courts in Narrowing Overbroad Speech Laws After Osborne v. Ohio*, 28 HARV. J. ON LEGIS. 253, 263–64 (1991) (stating that "once narrowing construction crosses the boundary into legislating . . . a court is making rather than interpreting the law. Such quasi-legislative action seems to violate the explicit separation of powers provisions that most states have in their constitutions." (internal citation omitted)).

expression that overbroad laws otherwise create.[225] If the plain meaning of an overbroad law forbids conduct protected by the First Amendment and courts are free to narrowly construe the law on a case-by-case basis, then the public must depend on each resulting construction to assess what the law actually criminalizes. Thus, when unbridled constructions that depart from the plain meaning of statutory language are regularly employed, the public has no reasonable way of predicting whether certain expressive conduct is legal, leaving citizens with an uncertain understanding of their constitutional freedoms. Absent reasonable predictability regarding the legal limits of expression, people naturally curtail the ways they exercise their First Amendment rights. Hence, the unpredictable and uncertain nature of unrestrained narrowing constructions has a predictable and certain consequence: free speech is chilled.

The *Hensel* dissent's proposed narrowing construction exemplifies the chilling effect created by unrestrained narrowing construction.[226] Despite limiting the reach of the statute, the dissent's construction would nonetheless criminalize a dangerous amount of otherwise constitutionally protected expressive conduct,[227] leaving citizens to guess at what distinguishes protected expression from criminal activity. Here, the *Hensel* majority held that the dissent's proposed narrowing construction would facially forbid conduct expressly protected by United States Supreme Court decisions on First Amendment grounds.[228] The *Hensel* majority forcefully concluded its opinion with this point, noting that the dissent's proposed construction "would still ban quintessentially protected expressive conduct," [229] such as wearing a black armband in protest of war,[230] burning a cross,[231] or burning an American flag on a public street.[232] For its part, the dissent deflected concern regarding the construed statute's application to these methods of expression by

225. State v. Hensel, 901 N.W.2d 166, 174 (Minn. 2017) (citing Virginia v. Hicks, 539 U.S. 113, 119 (2003)) (explaining that the key concern of the overbreadth doctrine is the chilling effect that overbroad statutes have on expression protected by the First Amendment).

226. *Id.* at 180–81 (Anderson, J., dissenting).

227. *Id.*

228. *Id.* at 181 (Stras, J., majority opinion).

229. *Id.*

230. Id. at 181 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503, 505–06 (1969)).

231. Id. at 181 (citing Virginia v. Black, 538 U.S. 343 at 359–60, 362, (2003)).

232. *Id.* at 181 (citing Texas v. Johnson, 491 U.S. 397 at 399 (1989)).

pointing to previous narrowing constructions employed by the Supreme Court of the United States which would prevent conviction for such conduct.[233] Thus, in an effort to cast away acknowledged constitutional concerns regarding overbreadth, the dissent justified its proposed construction through a speculative nesting-doll approach, which presumes that future narrowing constructions of its own proposed narrowing construction will curtail potentially overbroad applications of the statute.[234]

Despite acknowledging that the construed statute remains potentially overbroad, the dissent stated that the law "should not be held invalid merely because one can conceive of some impermissible applications."[235] Instead, the dissent contends that this specific construction will work in this particular case and is willing to forego constitutional invalidation even if doing so ultimately means narrowly construing an overbroad statute on a case-by-case basis ad infinitum.[236] Here, the dissent's steadfast effort to resuscitate the statute highlights the commonplace injury free expression suffers when courts use the cannon of constitutional avoidance to justify continuously rehabilitating constitutionally overbroad legislation, despite the chilling effect that such revivals perpetuate.[237]

In addition to illustrating the potential chilling effect of relying upon narrowing constructions, the position taken by the *Hensel* dissent exposed the fact that narrowing constructions often overstep defined precedential limits on judicial editing of legislation that is facially overbroad.[238] Here, the dissent's steadfast adherence to a "last resort" approach to invalidation,[239] coupled with its willingness to

233. *Id.* at 184 (Anderson, J., dissenting).

234. *Id.* at 184–85.

235. *Id.* at 183 (citing New York v. Ferber, 458 U.S. 747, 772 (1982)).

236. *Id.* at 185.

237. Virginia v. Hicks, 539 U.S. 113, 119 (2003) (explaining that the key concern of the overbreadth doctrine is the chilling effect that overbroad statutes have on expression protected by the First Amendment).

238. *See, e.g.*, R.A.V. v. City of St. Paul, 112 U.S. 2538 (1992); State v. Crawley, 819 N.W.2d 94 (Minn. 2012); *In re S.L.J.*, 263 N.W.2d 412 (Minn. 1978); City of St. Paul v. Mulnix, 304 Minn. 456, 232 N.W.2d 206 (1975); State v. Hipp, 298 Minn. 81, 213 N.W.2d 610 (1973).

239. 16A AM. JUR. 2D *Constitutional Law* § 175 (2018) (showing that the dissent's "last resort" approach to invalidation is consistent with the principles of statutory construction). "Within certain limits the courts, in order to uphold legislation, may restrict its application to a legitimate field of legislation, unless the act clearly indicates a different intention on the part of its framers. If an ambiguous or very general statute may, by a fair and reasonable interpretation of its language, be so

heavily edit otherwise unconstitutional law through narrowing constructions that add and delete language, would effectively discard any practical or reasonable limitations on the "readily susceptible" standard. The *Hensel* dissent's proposed narrowing construction is a prime example of the questionable "shave-a-little-off-here and throw-in-a-few-words-there"[240] approach employed by courts to render legislation constitutional through the addition and deletion of text. Shown here, with the proposed deletion and addition, the dissent's narrowing construction illustrates the departure from plain meaning that the specified modifications would have required:

> Whoever does any of the following in a public or private place, including on a school bus, knowing, ~~or having reasonable grounds to know~~ that it will, or will tend to, alarm, anger or disturb others or provoke an assault or breach of the peace, is guilty of disorderly conduct, which is a misdemeanor: . . . (2) disturbs an assembly or meeting, not unlawful in its character, so long as such disturbance is caused by conduct and not speech.[241]

Although this departure from plain meaning is glaring, there is ample support for the "last resort" approach embraced by the dissent.[242] Constructions that require addition and deletion of substantive statutory text are not the result of biased judicial preferences or revisionist oversteps by courts. Rather, such constructions result from adherence to the canon of constitutional avoidance, which outlines a solemn duty that courts are bound to

narrowed, limited, or restricted as to bring it within the scope of the constitutional power of the legislature, it is the duty of the courts to adopt the construction that will bring it into harmony with the constitution." *Id.* (internal citation omitted); *see also* 16 C.J.S. *Constitutional Law* § 247 (2018) (stating "[e]ven where a statute's constitutionality is fairly debatable, courts will uphold the law, and every reasonable construction must be resorted to in order to save a statute from unconstitutionality"). In *Hensel*, it is not the "last resort" principle that creates the tension. Rather, it is the "readily susceptible" standard applied to the narrowing construction inquiry that fosters the stimulating debate. *See* 901 N.W.2d at 175–78.

240. *Id.* at 180 (Stras, J., majority opinion).

241. *Id.* (showing the dissent's proposed construction of the statute, with strikethrough indicating the dissent's proposed deletion and underline indicating the dissent's proposed addition).

242. *See* New York v. Ferber, 458 U.S. 747, 769 n.24 (1982); *Broadrick v. Oklahoma,* 413 U.S. 601, 613 (1973); *Crawley*, 819 N.W.2d 94, 105 (Minn. 2012); State v. Machholz, 574 N.W.2d 415, 419 (Minn. 1998); *In re Haggerty,* 448 N.W.2d 363, 364 (Minn. 1989); *Mulnix*, 232 N.W.2d at 207; *Hipp*, 213 N.W.2d at 614.

follow.[243] The canon of constitutional avoidance requires that courts invalidate legislation only when all possible narrowing constructions are unworkable,[244] and the overbroad law at hand "creates an unnecessary risk of chilling free speech."[245] In support of this canon, the Supreme Court of the United States has described the substantial social costs of applying the overbreadth doctrine to invalidate a statute.[246]

In particular, the Court stated that "there comes a point at which the chilling effect of an overbroad law, significant though it may be, cannot justify prohibiting all enforcement of that law . . . ."[247] The Court held that the overbreadth doctrine is inappropriate if invalidation "blocks application of a law to constitutionally unprotected speech, or especially to constitutionally unprotected conduct."[248] Hence, the Court emphatically endorsed a robust canon of constitutional avoidance.[249] In accordance with this position, the *Hensel* dissent anchored its willingness to substantially edit the overbroad disorderly conduct statute in the duty created by the canon of constitutional avoidance.[250]

Consequently, *Hensel* is an engaging laboratory for the strain that underlies the contradictory duties courts face under the canon of constitutional avoidance and the separation of powers doctrine because the case demonstrates the tight doctrinal squeeze courts encounter when forced to wrestle with the option of narrowing construction, an exercise that necessarily requires judges to push up against the boundary that separates the judicial and legislative

243. *See Ferber*, 458 U.S. at 769 n.24; *Broadrick,* 413 U.S. at 613; *Crawley*, 819 N.W.2d at 105; *Machholz*, 574 N.W.2d at 419; *Haggerty,* 448 N.W.2d, at 364.; *cf. Mulnix*, 232 N.W.2d at 207 (identifying a disputed ordinance as one that the Court might strike down as facially vague and overbroad absent some judicial limiting and clarifying interpretations); *Hipp*, 213 N.W.2d at 614 (explaining the difficulty in applying the vagueness and overbreadth doctrines where challenged statutes not only plainly prohibit conduct or activity constitutionally within the power of the state to punish, but also where it may be applied to conduct or activities otherwise protected by constitutional right of free speech and peaceable assembly).

244. *See Ferber*, 458 U.S. at 769 n.24; *Broadrick,* 413 U.S. at 613; *see also* United States v. Thirty-Seven Photographs, 402 U.S. 363, 372–73 (1971); Cox v. New Hampshire, 312 U.S. 569, 577 (1941).

245. *Crawley*, 819 N.W.2d at 105.

246. *Virginia v. Hicks, 539 U.S. 113, 119 (2003).*

247. *Id.*

248. *Id.*

249. *Id.* at 119–20.

250. State v. Hensel, 901 N.W.2d 166, 181 (Minn. 2017) (Anderson, J., dissenting).

branches of government.[251] The divergent yet mutually supported opinions in *Hensel* as to the limits of narrowing construction highlight the relative fluidity of the boundary between the branches, and show a court struggling to simultaneously uphold two fundamental judicial responsibilities that are reciprocally destructive when pushed to their extremes.[252]

Ultimately, the *Hensel* majority's insistence on a reasonable threshold of susceptibility strikes a shrewd balance between a strict adherence to the cannon of constitutional avoidance, on one hand, and an unyielding dedication to separation of powers, on the other. A reasonable susceptibility threshold, requiring that a statute's plain meaning supports a given narrowing construction, significantly reduces the chances that courts will engage in excessive rewrites, yet it does not impractically limit a court's ability to narrowly construe law within the boundaries of plain meaning.

When these principles are appropriately applied, courts stay out of the legislative domain, respecting the separation of powers, but also retain judicial flexibility in forming narrowing constructions when appropriate, thereby following the cannon of constitutional avoidance. Thus, despite the thorny juxtaposition of judicial duties inherent in the case, the *Hensel* majority outlined a balanced strategy to tackle questions regarding the proper limits of narrowing constructions. Accordingly, *Hensel* is a useful model for courts faced with situations in which a statute's susceptibility to narrowing construction is at issue.

V. CONCLUSION

Hensel is a window into the legacy of unrestrained narrowing construction that was, to a substantial degree, fueled by *Chaplinsky*, a case that significantly eroded the centrality of plain meaning in judicial interpretations by giving birth to the fighting words doctrine, a precedential monolith that enshrined a dangerously low threshold of susceptibility to narrowing construction in cases where prohibitions on expression protected by the First Amendment are concerned.[253] In the precedential wake of *Chaplinsky*'s disregard for statutory plain meaning, the Minnesota Supreme Court has routinely

251. *See id.*
252. *See id.*
253. *See* Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

ignored and expanded the text of legislation by adopting unrestrained narrowing constructions to avoid invalidating statutes.[254]

Hensel exposes the contradictory pressures exerted on courts by the cannon of constitutional avoidance and a "reasonable susceptibility" threshold.[255] In response to this dilemma, the *Hensel* majority articulated a rational tact for addressing such pressure that respects the separation of powers doctrine while allowing courts the flexibility to employ narrowing constructions where a reasonable susceptibility exists, thereby avoiding the pitfalls of blind adherence to either constitutional avoidance or separation of powers.[256] Although the issue is complicated by the substantial precedential support for an unbridled approach, *Hensel* shows that a restrained application of narrowing constructions is the only option that simultaneously respects both the separation of powers doctrine and the reasonable limits of the cannon of constitutional avoidance.

Accordingly, future cases weighing a statute's susceptibility to narrowing construction might consider *Hensel* as a bellwether for a practical tilt toward restraint that is supported by the weight of precedent as well as substantial policy interests. Thus, in *Hensel*'s wake, rather than *Chaplinsky*'s, courts might appropriately cast off any self-bestowed responsibility to act as the supreme editors of inherently flawed legislation and instead serve their intended purpose as the ultimate arbiters of well written laws. In so doing, courts may properly serve their unique, essential, and honored role as the only neutral authority in our democracy. By following *Hensel*'s example of reasonable restraint regarding narrowing constructions, courts preserve the vital boundaries between the judicial and legislative branches of government and thereby safeguard the continued vibrance of our pioneering tripartite system of democracy as well as our fundamental, constitutional rights to free expression.

254. *See, e.g.*, State v. Crawley, 819 N.W.2d 94 (Minn. 2012); *In re* R.A.V., 464 N.W.2d 507 (Minn. 1991); *In re S.L.J.*, 263 N.W.2d 412 (Minn. 1978); City of St. Paul v. Mulnix, 304 Minn. 456, 232 N.W.2d 206 (1975); State v. Hipp, 298 Minn. 81, 213 N.W.2d 610 (1973).

255. *See* 901 N.W.2d. 166 (Minn. 2017).

256. *See id.*